

SK1/TRP/hl2 3/11/2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition
for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition
for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)
(FCC Triennial Review
9-Month Phase)

**ASSIGNED COMMISSIONER'S RULING DENYING IN PART
AND GRANTING IN PART MOTIONS ON CONTINUATION
OF UNBUNDLED NETWORK ELEMENT PLATFORM**

Introduction

On March 1, 2005, a joint motion was filed by MCI, Inc., The Utility Reform Network (TURN), Blue Casa Communications, Inc. Wholesale Air-Time, Inc. Anew Communications Corp d/b/a Call America, TCAST Communications, and CF Communications LLC d/b/a Telekenex (Joint Movants). Each of the Joint Movants (except for TURN) are competitive local exchange carriers (CLECs) that have Interconnection Agreements (ICAs) with Pacific Bell Telephone Company (Pacific), by and through its parent company, SBC Communications (SBC). Each of the ICAs (patterned after the ICA between MCI and Pacific) provides that Pacific shall provision unbundled network elements (UNEs) in combinations, including the "UNE Platform (UNE-P).

The Joint Motion was filed in response to SBC's announcement that, beginning on March 11, 2005, it will reject all orders for new lines utilizing UNE-P and will also stop processing requests for moves, adds, and changes for each CLEC's existing UNE-P customer base. SBC will take this action pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.

Joint Movants seek a Commission order forbidding SBC from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective ICAs. Joint Movants claim that affected CLECs will be unable to place UNE-P orders in California after March 10, 2005, unless this Commission takes affirmative action to forbid SBC from rejecting such UNE-P orders pending compliance with the change-of-law provisions in their respective interconnection agreements. Unless such Commission action is taken, Joint Movants claim that CLECs will sustain immediate and irreparable injury because they will be unable to fill service requests for existing and new UNE-P customers.

On March 2, 2005, DMR Communications and Navigator Telecommunications, LLC (collectively Small CLECs) filed a similar motion entitled "Motion for an Order Requiring SBC to Comply With Its CLEC Interconnection Agreements." The motion presents allegations and seeks relief essentially similar to that requested in the Motion filed in this same proceeding on March 1, 2005, by MCI, Inc. et. al. The DMR ICA is patterned after the AT&T ICA, except for its reciprocal compensation provisions. The Navigator ICA was approved in Resolution T-16524. Both the DMR and Navigator ICAs contain

provisions for negotiation and dispute resolution for change of law provisions similar to those patterned after the MCI ICA.

Pursuant to the schedule set by the ALJ, replies in opposition to both motions were filed by SBC on March 4, 2005. A response in support of the joint motion was also filed by nni Communications, Ltd and California Catalog & Technology, Inc. d/b/a CCT Telecommunications, with supplemental concurrence by Blue Casa Communications, Inc. and Wholesale Air-Time. A response in support of the joint motion was also filed by Arrival Communications, Inc. A response was also filed by AT&T Communications of California, Inc., TCG Los Angeles, TCG San Diego and TCG San Francisco (AT&T), asking for the same relief for AT&T as may be granted to the Joint Movants and/or the Small CLECs.

The ALJ also specifically identified two questions to be addressed in parties' replies relating to ¶ 227 of the TRRO. The ALJ also authorized responses, filed on March 7, 2005, to the SBC reply limited to these two questions. In response to a March 7, 2005, email request, Joint Movants were granted leave to file a general third-round response on March 8, 2005.

Sequence of Events Leading to the Motion

On February 4, 2005, the FCC issued the TRRO, determining that the ILECs are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Act. The effective date of the TRRO is March 11, 2005.

Regarding the required process for implementing the provisions of the TRRO regarding the availability of UNE-P, the FCC stated:

Mass Market Local Circuit Switching. Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to

mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar. (TRRO ¶ 5, emphasis added by italics)

In addition, the FCC also said,

Further, regardless of any potential impairment that may still exist, we exercise our “at a minimum” authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling*. (TRRO ¶ 204, emphasis added by italics)

Concerning the embedded base of customers the FCC notes:

Because unbundled local circuit switching will no longer be made available pursuant to section 251(c)(3), we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement*. (TRRO ¶207, emphasis added by italics, footnote omitted)

The FCC adopted a transition plan that calls for CLECs to move their UNE-P embedded customer base to alternative service arrangements within 12 months of the effective date of the TRRO. The FCC also prescribed the basis for pricing during the transition period for unbundled switching provided pursuant to Section 251 (c)(3).

Finally, concerning the overall implementation of the order, the FCC states

Given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register. (TRRO ¶ 235.)

In addition, to implement the order, the TRRO states: “We expect that incumbent LECs and competing carriers will implement the Commission’s findings as directed by Section 252 of the Act. [footnote omitted.] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.” (TRRO ¶ 233.)

SBC issued several “Accessible Letters” on February 11, 2005 (attached as Exhibit A to the Motion) in which SBC provided notification to CLECs concerning how it intended to modify its service offerings in response to the TRRO. The SBC Accessible Letters include a commercial offering described as “Interim UNE-P Replacement.” In the Accessible Letter, SBC characterizes this offering as designed to be a bridge between March 11, 2005, i.e., the effective date of the TRRO, and when SBC and the CLEC are able to reach agreement on a long-term commercial agreement. Under this commercial offering, SBC would continue to provide the CLEC with the ability to acquire and provision new mass market local switch port with loop combinations, but at a new price to be unilaterally determined by SBC, and higher than the UNE-P prices currently paid under the Agreement.

Parties’ Positions

Joint Movants argue that SBC’s proposed actions would constitute breach of the Joint CLECs’ interconnection agreements in at least two respects: (1) by rejecting UNE-P orders that it is bound by the ICA to accept and process and (2) by refusing to comply with the change-of-law or intervening law procedures established by the ICAs.

In support of its Motion, Joint Movants attached the "Affidavit of Kathy Jespersen," the designated contract notices manager for interconnection agreements between MCI's California local service entities and Pacific Bell. Based on her interactions with MCI mass market business units, Jespersen asserts that MCI will be adversely affected in its efforts to provide reasonably adequate service to its mass market customers if SBC rejects request for new UNE-P orders beginning on March 11, 2005. Jespersen asserts that SBC's refusal to accept new orders will prevent MCI from obtaining new customers, and its refusal to access moves, adds and changes relating to the embedded base of existing customers will lead to inadequate service for those customers.

Joint movants argue that the TRRO requires that its change-of-law provisions be implemented through modifications to the parties' ICAs. In this regard, as noted above, the TRRO (§ 233) requires that parties "implement the [FCC's] findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." Thus, this requirement of the TRRO recognizes that some period of time may be necessary for parties to negotiate the appropriate changes to their interconnection agreements to conform to the change of law provisions.

In its response filed March 3, 2005, in support of the Motions, nni Communications pointed out that service to its 23,000 payphone customer lines depends on availability of the "Flex-ANI" switch feature that is used to identify calls as originating from payphones so that mandatory payphone compensation can be accounted and paid for by interexchange carriers. Yet, SBC refuses to continue providing nni Communications with this required feature even under a separate "commercial agreement."

SBC opposes the Joint Motion and the Small LEC Motion in their entirety. SBC argues that there is no basis for the Commission to prohibit SBC from terminating its offering of new UNE-P arrangements effective March 11, 2005, since SBC is merely complying with the requirements of the TRRO. Although the FCC adopted a 12-month transition period from the effective date of the TRRO, SBC argues that this period only applies to the embedded customer base of existing UNE-P lines. (TRRO ¶ 199)

Discussion

Parties' pleadings raise issues concerning the timing of the implementation of the provisions of the TRRO relating to new UNE-P arrangements. Specifically, the question is whether the provisions of the TRRO regarding elimination of new UNE-P arrangements form a sufficient basis for SBC to unilaterally implement its Accessible Letters on March 11, 2005, even though parties have not yet completed the process outlined in the ICA to negotiate appropriate amendments relating to applicable changes of law under the TRRO. As a basis for resolving the issues in the Joint Motion, the relevant authority is in the provisions of the TRRO and the provisions of the ICAs outlining the sequence of events to occur in order to implement applicable changes of law.

Applicability of Exceptions Under ¶ 227

The TRRO does, in fact, set different timetables for the embedded customer base versus new customers with respect to the transition period. The TRRO states: "The [12-month] transition period shall apply only to the embedded customer base, and *does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order.*" (¶ 227)

SBC interprets this language as prohibiting the CLECs from adding any new UNE-P arrangements after the effective date of the TRRO. SBC views this prohibition as self-effectuating, and interprets the limiting clause “except as otherwise specified,” as referring merely to carriers’ option of voluntarily negotiating “alternative arrangements...for the continued provision of UNE-P,” as referenced in ¶ 228.

By contrast, the Joint Movants interpret the clause “except as otherwise specified in this order,” as referring to ¶ 233. Specifically, Joint Movants interpret ¶ 233 as entitling Joint CLECs to continue adding new UNE-P customers after March 11, 2005, until the current interconnection agreements are amended to prohibit it. Joint Movants also interpret the reference to “new UNE-P arrangements” to be limited to arrangements for new customers, not including subsequent changes or additions to UNE-P arrangements for existing UNE-P customers.

Parties thus disagree as to whether “new arrangements” refer only to new customers or also include modifications to service arrangements of the existing UNE-P customer base made after March 11, 2005 and whether the exception clause permits the continued provision of UNE-P to new and existing customers pending the development of a new ICA.

We will interpret ¶ 227 and the term “new arrangements” in light of the whole order.

First, we note that the FCC has clearly stated that “Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching.” (TRRO, ¶ 5, emphasis added.) In addition, it is clear that the FCC desires an end to the UNE-P, for it states “. . . we exercise our “at a minimum” authority and conclude that the disincentives to investment

posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling.*" (TRRO ¶ 204, emphasis added by italics.) Therefore, since there is no obligation and a national bar on the provision of UNE-P, we conclude that "new arrangements" refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both.

Other parts of the TRRO also support this interpretation. In particular, the FCC also states: "... we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.*" (TRRO ¶207, emphasis added by italics, footnote omitted.) Note that this last statement refers to "the embedded base of unbundled local circuit switching;" it does *not* refer to an "*embedded base of customers.*" This statement suggests that there is a need only to transition those already having the UNE-P service, and that there is no need to transition customers who buy the UNE-P service over the next twelve months.

Even when the FCC discusses market disruption caused by the withdrawal of UNE-P service, the FCC limits its discussion to the taking away of service from customers who already possess UNE-P. Although the FCC notes in ¶ 226 that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors," this statement is contained in the section of the TRRO titled "Transition Plan." Thus, the FCC's concerns over the disruption to service caused by the withdrawal of UNE-P are focused on those customers undergoing a transition away from UNE-P. This statement does not indicate that the FCC believes that the failure to provide new UNE-P services to

still more customers would be disruptive. Indeed, common sense indicates that it would more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued.

In summary, the only reasonable interpretation of the prohibition of “new service arrangements” is that this term embraces any arrangements to provide UNE-P services to any customer after March 11, 2005. However, the order did establish an exception process to this blanket bar.

Concerning “the *except as otherwise specified in this Order*” exception contained in ¶ 227, we see that as referring to the need to negotiate serving arrangements, particular as to the customers undergoing transition or already holding UNE-P services. In particular, the TRRO still contemplated a transitional process to pursue contract negotiations so that CLECs could continue to offer services to new customers and existing customers.

In particular, the TRRO also states:

We expect that incumbent LECs and competing carriers will implement the Commission’s findings as directed by section 252 of the Act. [footnote omitted] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [footnote omitted] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [footnote omitted] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay. (TRRO, ¶ 233, emphasis added by italics.)

This clearly indicates that the FCC did not contemplate that ILEC's would unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the TRRO. Just as clearly, the California Commission was afforded an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Moreover, the Commission was encouraged by the FCC to monitor the implementation of the accessible letters issued by SBC to ensure that the parties do not engage in unnecessary delay.

The warning against unreasonable delay is meaningful only where a process for contract negotiation was contemplated to implement change of law provisions that could extend beyond March 11, 2005. The remedy against unreasonable delay is not to circumvent the negotiation process by unilateral implementation of the ILEC's Accessible Letters on March 11, 2005.

Thus, the centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period. To date, there have been few negotiations between SBC and the petitioners that would lead to interconnection agreement amendments that conform to the FCC's TRRO. Therefore, to afford the parties additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECs embedded customer base as contemplated by the TRRO, SBC is directed to continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005. SCB is directed to not unilaterally impose those provisions of the accessible letter that involve the embedded customer base until the company has either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached. During this negotiation

window, all parties are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

In summary, we see three different situations and different implications of the TRRO:

1. For new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005. Therefore, the accessible letter may take effect at that time.
2. For existing CLEC customers already receiving UNE-P services that seek new serving arrangements involving UNE-P, SBC will process new orders for UNE-Ps while negotiations to modify the ICA's continue, but will do so only until May 1, 2005 at the latest.
3. During the transition period until March 11, 2006, absent a new ICA, ILECs must continue to maintain the existing serving arrangements involving UNE-P that CLEC customers currently have, but the TRRO has authorized ILECs to increase the price of UNE-P by \$1.

Process for Implementing Applicable ICA Amendments for UNE-P Replacement

Since further ICA amendments are required, no party shall be permitted to use negotiations as a means of unreasonably delaying implementation of the TRRO or attempting to defeat the intent of the TRRO. The TRRO envisioned a limited period of negotiations, to be monitored by state commissions, after which the UNE-P prohibition against new arrangements would take effect.

Section 29.18 of the ICA between SBC and MCI under the Appendix “General Terms and Conditions” sets forth the process and sequence of events whereby changes of law are implemented.

29.18 Intervening Law

... If the actions of ...regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis or rationale for a provision of the contract, the affected provision shall be invalidated, modified or stayed, consistent with the action of the regulatory body. In the event of any such action, the Parties *shall expend diligent efforts to arrive at an agreement respecting the appropriate modifications to the Agreement. If negotiations fail*, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions *shall be resolved pursuant to the dispute resolution process provided for in this Agreement....* (emphasis added).

The process for dispute resolution is set forth in Section 29.13 “Alternative to Litigation” of the ICA.

Thus, in accordance with these provisions of the ICA, parties are to first pursue “diligent efforts” to agree on appropriate modifications to the agreement. According to the Affidavit of Jespersen, SBC did not engage in any negotiations with MCI regarding the subject matter of the February 11th Accessible Letters. SBC replies that for more than two weeks after it advised CLECs that it would no longer accept new UNE-P orders after March 11, 2005, the CLECs “did nothing.” Jespersen states, however, that MCI wrote to SBC on February 18, 2005, indicating that it considered the February 11th Accessible Letters to be an anticipatory breach of MCI’s ICA, as well as a violation of the notice, change of law, and dispute resolution terms thereof.

In any event, parties’ efforts have failed to produce agreement on the appropriate modifications to implement the change of law provision relating to the elimination of UNE-P. As noted above, SBC remains obligated to continue to

offer new serving arrangements involving UNE-P for existing customers already holding UNE-P services until no later than May 1, 2005 or until an agreement is reached. As noted above, the FCC has also prescribed the basis for pricing of the embedded UNE-P base during the transition period as provided pursuant to Section 251 (c)(3). The pricing of new UNE-P arrangements added before May 1, 2005 should likewise apply the same transition pricing.

IT IS RULED that:

1. The Motions of Joint Movants and Small CLECs are hereby denied in part and granted in part in accordance with the terms and conditions outlined above.
2. SBC shall continue to honor its obligations under the TRRO in accordance with the discussion outlined above.
3. SBC has no obligation to process CLEC orders for UNE-P to serve new customers.
4. Parties are directed to proceed expeditiously with good faith negotiations toward amending the ICA in accordance with the TRRO.
5. If parties have not reached an agreement on the necessary amendments for new arrangements to serve new orders placed by existing CLEC customers,

CERTIFICATE OF SERVICE

I certify that I have served by electronic mail to the parties for whom an electronic mail address has been provided, this day and by U.S. Mail on Monday, March 14, 2005, served a true copy of the original attached Assigned Commissioner's Ruling Denying in Part and Granting in Part Motions on Continuation of Unbundled Network Element Platform on all parties of record in this proceeding or their attorneys of record.

Dated March 11, 2005, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

SBC shall continue processing CLEC orders for UNE-Ps (for these existing customers) already holding UNE-P services until no later than May 1, 2005.

Dated March 11, 2005 in San Francisco, California.

/s/ SUSAN P. KENNEDY by TJS

Susan P. Kennedy
Assigned Commissioner

(END OF ATTACHMENT A)